testimony in his trial. We conclude, therefore, that the testimony of Thomas and Lockhart was inadmissible, because of the circumstances under which it was obtained, and that it should have been excluded upon objection by defendant's counsel."

Larceny—Appropriation of Amount of Check in Excess of that Due.—In Hedge *v.* State, 229 S. W. 862, the Court of Criminal Appeals of Texas held that where debtor by mistake gave creditor a check for an amount in excess of that actually due, and the creditor took the excess amount without the debtor's consent, with the intent to deprive debtor of the value thereof and to appropriate it to his own use and benefit, the creditor was guilty of theft of the excess amount under Vernon's Ann. Pen. Code 1916, art. 1332, notwithstanding that the creditor was entitled to a portion of the amount of the check, the theft consisting of the appropriation of the excess amount, and not in the taking of the check itself.

The court said in part: "Counsel appointed to defend, with disinterested fidelity has filed an able motion for rehearing, urging that what appellant took was in fact a check for $1,061, and that, inasmuch as he was rightfully entitled to part of the proceeds of said check, he was part owner of the property so taken, and hence guilty of no offense. We are unable to agree to the soundness of this proposition under the facts of this case. If A owes B $7.50, and by mistake gives in settlement a check for $75, which B accepts, places in his pocket, and presents at the bank, and, upon payment to him by the bank of the $75 called for by said check, conceives the intent to appropriate the $67.50 excess, he would be guilty of theft of such excess. Illustrations might be multiplied. One might be given a trunk or grip by the owner, to be carried to a certain point, or a carrier might receive a coat to be taken to a shop to be pressed, and in either illustration a $100 bill might be found therein, and if the party who had received the trunk, grip or coat originally conceived at the time of finding the money an intent to appropriate it, and did so appropriate it, it occurs to us that his offense would relate to the time of the appropriation of the money. In the instant case the bank lost nothing; the check was genuine, and drawn by the maker for the sum stated. The owner lost the $424, and the loss was not that of the bank. We think at the time appellant acquired said money, if his acquisition was accompanied with the intent at the time to appropriate said excess, it made him guilty of theft of the money. If charged with the theft of the check, there might be ground for the contention. A check in a sense is property whose value is wholly relative, and, unless there be money of the drawer in the bank named therein at the time of presentment for payment, said check but evidences an agreement to pay, and is subject to explanation, contradiction, or entire defeat of value, as are other similar instruments. It does not even operate as an assignment of funds, or the extinguish-

ment of a debt, except the money be on hand in the bank and be paid upon presentment. We think one who receives a check and uses the same as a means to fraudulently obtain money not his own, with intent to appropriate same, and who does so appropriate it, may be charged and convicted of theft of such money if the case made by the pleading and submitted in charge to the jury is based on an intent to appropriate, entertained and executed when said money comes into the possession of the person who received said check and presented it for payment."

Negligence—Duty of Bank to Provide Safe and Suitable Entrance. —In Downing *v.* Merchants' Nat. Bank, 184 N. W. 722, the Supreme Court of Iowa held that the owner of a bank owes a duty to all persons who properly come to the bank on business to exercise reasonable care and prudence to provide a safe and suitable entrance, and to have the approaches so constructed and maintained that visitors would not be liable to step into dangerous pitfalls by reason of misleading doors.

The court said in part: "We are not prepared to hold that, as a matter of law, a person about to enter a bank, store, or other business building, which the public is invited to enter for the transaction of business, is guilty of negligence in failing to look to the floor of the vestibule or corridor of such a place of business before crossing the threshold of an open door. As a general rule, it may be stated that the defendant owed a duty to all persons who properly came to the bank on business to exercise reasonable care and prudence to provide a safe and suitable entrance to said bank and to have the approaches thereto so constructed and maintained that visitors would not be liable to step into dangerous pitfalls by reason of misleading doors. As bearing on this general proposition, see Foren *v.* Rodick, 90 Me. 276, 38 Atl. 175; Gordon *v.* Cummings, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846; Hayward *v.* Merrill, 94 Ill. 349, 34 Am. Rep. 229; Camp *v.* Wood, 76 N. Y. 92, 32 Am. Rep. 282; Gillvon *v.* Reilly, 50 N. J. Law, 26, 11 Atl. 481.

" 'It is a sound rule of law that it is not contributory negligence not to look out for danger when there is no reason to apprehend any.' Engel *v.* Smith, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549. * * *

"In Hayward *v.* Merril, 94 Ill. 349, 34 Am. Rep. 229, plaintiff was a guest at a hotel. His room was in the hallway and was numbered '38.' It was the corner room. About 2½ feet from it was another room numbered '40.' The doors of the two rooms were alike. Gas was burning in the hall, but not very brightly. The plaintiff had recently been a guest at the hotel, and occupied room 38, which was now assigned him. By mistake he opened room No. 40, and fell down an opening, and was injured. It was held that the case was properly for the jury.